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JAMES H. McKENNEY,
Clerk

No. 639. 2x6 6.

Bk. of Greene v. Breckenridge for

639

Petitioner.

Filed May 10, 1900.

Supreme Court of The United States.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

V.

GRAND VIEW BUILDING ASSOCIATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

LEW. W. GAGE, Printer, Omaha.

Supreme Court of The United States.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

V.

GRAND VIEW BUILDING ASSOCIATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner Northern Assurance Company of London, England, shows unto your Honors the following facts:

1. On August 30th, 1898, (printed record, pp. 1 and 9) respondent, a corporation created under the laws of Nebraska, brought suit against petitioner a corporation created under the laws of the Kingdom of Great Britain and Ireland, in the district court of Lancaster county, Nebraska, claiming judgment against petitioner for twenty-five hundred dollars with interest thereon at seven per cent per annum from July 26th, 1898, upon a policy of insurance covering certain property alleged to have been destroyed by fire.

2. On September 29th, 1898, (printed record p. 15)

your petitioner procured an order in the said district court of Lancaster county, Nebraska, removing the said cause to the circuit court of the United States for the district of Nebraska on the ground of the diverse citizenship of the parties thereto.

3. Issues were duly joined and said cause came on for trial in the circuit court of the United States for the district of Nebraska on December 19, 1898, before the court and a jury and a special verdict was therein returned. (pp. 19, 20.)

4. On December 22nd, 1898, each party moved the court for a judgment in its favor respectively upon the findings of the jury (p. 21,) the court overruled the motion of petitioner, sustained the motion of respondent, and entered judgment against your petitioner and in favor of respondent for twenty-five hundred dollars with interest at seven per cent per annum from September 26th, 1898, and costs. (p. 22.)

5. Your petitioner prosecuted a writ of error from said judgment to the United States circuit court of appeals for the eighth judicial circuit (pp. 38, 40), said cause being entitled in said circuit court of appeals, "No. 1248, Northern Assurance Company of London, England, plaintiff in error, v. Grand View Building Association, defendant in error."

6. The circuit court of appeals for the eighth circuit in its opinion in said cause (p. 45), filed in said court on March 26, 1900, by a divided court, affirmed said judgment against your petitioner.

7. A certified copy of the entire record of the said cause in the said circuit court of appeals for the eighth circuit is herewith furnished and made a part of this

application marked exhibit A in conformity with rule 37 of this Honorable court.

8. Your petitioner is advised and believes that the said judgment of the United States circuit court of appeals of the eighth circuit in said cause, is erroneous in the following particulars:

I. The policy upon which the suit was brought contains the following provision:

> "This entire policy unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the assured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

And said policy also contains the following stipulation:

> "No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver if any shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance in this policy exist or be claimed by the insured unless so written or attached."

By special finding 5 (p. 20), it is found that when the policy in suit was issued there was other insurance upon the insured property in the sum of fifteen hundred dollars in the Firemen's Fund Insurance Company.

By findings 6 and 7 it is found that the recording agent of your petitioner, whose authority was limited

to the countersigning and issuance of policies, the acceptance of risks, and the receipt of premiums, and who, as such recording agent issued the policy sued on, knew when said policy was issued and delivered to respondent, that there was then fifteen hundred dollars other insurance upon the insured property, which insurance was issued prior to the date thereof, and by finding 9 it is found that consent to such concurrent insurance of fifteen hundred dollars was not endorsed thereon. It is not found that petitioner was ever notified of the fact of such concurrent insurance until after the fire nor that it ever in any manner consented thereto; and the question for determination upon said special findings of the jury is whether the knowledge of petitioner's recording agent, whose powers were limited as above stated, acquired prior to the issuance and delivery of the policy containing the stipulations above quoted, of the fact of other insurance then existing upon the insured property, but not consented to by endorsement upon the policy, and which knowledge was not communicated to the company, constituted a a waiver of the conditions of the policy requiring its consent to other insurance to be endorsed in writing thereon, or estops the company to insist after the fire, that said policy was void from the date of its issue because of such other insurance not consented to in writing endorsed thereon. The circuit court of appeals of the eighth circuit erroneously held (p. 45), Circuit Judge Sanborn dissenting (p. 50), that the knowledge of the company's agent of the fact of additional insurance, although same was not consented to in writing endorsed upon the policy, as required by its terms, was a waiver of the provision thereof, requiring consent to such additional insurance to be so endorsed, and that

the knowledge of the agent of such concurrent insurance at the time he issued the policy in suit, estops petitioner to insist that same is void because of such concurrent insurance not so endorsed.

A majority of the judges of said circuit court of appeals of the eighth circuit overruled *Carpenter v. Providence Washington Insurance Company*, 16 Pet. 495, and declined to adjudge the question in harmony with that decision of this court, and with the decisions of the circuit court of appeals for the seventh circuit in *Union National Bank v. German Insurance Company*, 34 U. S. App. 397, 402, 18 C. C. A. 203, 206, 71 Fed. 473, 476, and in *United Firemen's Insurance Company v. Thomas*, 53 U. S. App. 517, 521, 27 C. C. A. 42, 44, 82 Fed. 406.

II. The verdict was special and does not find that petitioner's agent, in delivering the policy in suit, with knowledge of the other insurance, intended to waive the conditions of said policy, avoiding it for other insurance not consented to by the company in writing endorsed thereon, and the judgment upon the special verdict should, upon this ground, have been in favor of petitioner.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States circuit court of appeals for the eighth circuit, commanding the said court to certify and send to this court on a day to be therein designated, a full and complete transcript of the record of said circuit court of appeals in the said cause therein entitled "Northern Assurance Company of London, England, plaintiff in error, v. Grand View Building Association, defendant in error, No. 1248" to

the end that the said cause may be reviewed and determined by this court as provided by law, and that the said judgment of the said circuit court of appeals in the said cause and every part thereof may be reversed by this Honorable court, and the judgment of the circuit court for the district of Nebraska reversed and a judgment directed for your petitioner.

And your petitioner will ever pray.

CHARLES J. GREENE,
RALPH W. BRECKENRIDGE,
Attorneys for Northern Assurance Company of London, England, petitioner.

UNITED STATES OF AMERICA: }
Northern District of Illinois: } *ss.*

G. H. Lermit, being duly sworn, says he is the manager of the western department of the Northern Assurance Company of London, petitioner in the above written petition for writ of certiorari, and authorized in behalf of said petitioner to verify same; that he has read said petition and the same is true of his own knowledge, except such matters as are therein stated on belief, and as to such statements he believes it to be true.

(*Signed*) G. H. LERMIT.

Subscribed in my presence and sworn to before me this 24th day of April, 1900.

SEAL.

(*Signed*) S. W. BURNHAM,
Clerk.

Supreme Court of The United States.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

V.

GRAND VIEW BUILDING ASSOCIATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The importance of the question involved in this case cannot be measured by the amount of the judgment sought to be reversed. The insurance companies doing business throughout the United States issue annually thousands of policies containing the stipulations avoided by the judgment your Honors are asked to review, and daily face the question at issue herein, which has been the subject of a multitude of conflicting decisions, not only in the courts of the states but in the federal circuit courts and the federal circuit courts of appeals, notwithstanding the unanimous decision of this court, voiced by Mr. Justice STORY in *Carpenter v. Providence Washington Insurance Company*, 16 Pet. 495; and because some of the federal courts have refused to be bound by that decision although it is directly in point, and have *in terms repudiated* its doctrine as obsolete, while other federal courts and judges not only adhere to the doctrine of the case as the law, but follow the case itself as an authority, your Honors should re-examine the question and *yourselves* reaffirm or re-

verse the *Carpenter* case, that there may be no longer any doubt as to the rule of law which must govern, at least in the federal courts of the country, upon facts similar to those presented by the record in this case.

This application, therefore, is believed to be within not only the letter but the spirit of the rule announced by the court through Mr. Justice BREWER in *Forsyth v. City of Hammond*, 166 U. S. 506, 17 Sup. Ct. 665:

> "We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in certiorari extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute, would be finally determined in that court. And, further, that while this power is co-extensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and courts of a state, . . . demands such exercise."

Circuit Judge SANBORN in his dissenting opinion in this case states the disagreement between the courts in the following language:

> "The question which this case presents has long been the subject of conflicting decisions. In *Carpenter v. Providence Washington Insurance Company*, 16 Pet. 495, 496, 511, the policy contained this stipulation: 'And provided further, that in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation, and mentioned in or indorsed

upon the policy, then this insurance shall be void and of no effect.' There was other insurance upon the property at the time this policy was issued. Mr. Justice STORY expressed the *unanimous opinion of the supreme court upon the question in controversy in this case* in these words: 'The third instruction prayed the court to instruct the jury, that if the Washington Insurance company had notice, in fact, of the existence of the policy in the American office, that 'was, in law, a compliance with the terms of the policy.' The court refused to give the instruction as prayed; but instructed the jury that, at law, whatever might be the case in equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or endorsed upon the policy; otherwise, the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with when there has been no such mention or endorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect.'

"This decision was rendered in 1842, has never been overruled and in 1897 the circuit court of appeals for the seventh circuit reached the same conclusion. *Union National Bank v. German Insurance Company*, 34 U. S. App. 397, 402, 18 C. C. A. 203, 206, 71 Fed. Rep. 473, 476; *United Firemen's Insurance Company v. Thomas*, 53 U. S. App. 517, 521, 27 C. C. A. 42, 44, 82 Fed. Rep. 406, 408.

"A careful reading of the cases upon both sides of the question has forced my mind to the conclusion that the supreme court and the circuit court of appeals for the

seventh circuit are right, and for the following reasons:"

(Here follows a statement at length of Judge SANBORN'S views upon the point in controversy. pp. 51 to 54.)

It is not deemed proper at this time, nor necessary, to cite the decisions of the state courts which are opposed to the doctrine of the majority opinion and which are in harmony with the doctrine unanimously announced by this court in 1842 in the *Carpenter* case. Some of them are referred to by Judge SANBORN. The majority opinion is grounded upon *Firemen's Fund Insurance Co. v. Norwood*, 32 U. S. App. 490, 69 Fed. 71, in which case, in the opinion by Judge CALDWELL, (Judge SANBORN dissenting) it is assumed that the doctrine of the *Carpenter* case, that the requirement of written consent cannot be waived by parol, but that consent to additional insurance must be endorsed in writing upon the policy, "has been so generally denied and repudiated by the courts of the country, state and federal, that it has come to be regarded as overruled and obsolete;" and certain decisions are therein cited, which, Judge CALDWELL claims "effectually dissipate the the doctrine" of the *Carpenter* case.

Counsel for petitioner insist that the doctrine of the case cited is not obsolete, that *not one* of the decisions of this court cited in the *Norwood* case in support of the declarations above quoted, *involves the doctrine of the Carpenter case*, and are sustained by the statement of Judge SANBORN, that the latter has never been overruled. The *Norwood* case has been followed, and the *Carpenter* case ignored, by the circuit courts of appeals for two other circuits; in the sixth circuit, in *London and Lancashire Insurance Company v. Fischer*, 34 C. C. A. 503, 92 Fed. 500, and in the ninth circuit in

McElroy vs. British American Assurance Co. of Toronto, 36 C. C. A. 615, 94 Fed. 990. This singular conflict of opinion is pronounced and irreconcilable; but when a United States circuit court of appeals declines to be bound by a decision of this court *in point*, claiming that its doctrine has been so generally denied and repudiated by the courts of the country, state and federal, that it has come to be regarded as overruled and obsolete, a situation is presented which calls for the prompt interposition of this court; it is believed to be an hitherto unheard of thing, for the federal courts to refuse conformity to a doctrine promulgated from this bench, and this court should either maintain the authority of its decisions, or admit its error.

The judgment herein also violates a settled rule of practice. *The findings of fact leave the question of waiver to be inferred as a matter of law.* It is an essential prerequisite to the rendition of a judgment upon a special verdict that *all the facts necessary* to a recovery shall be found. In the case at bar, *the fact* upon which the plaintiff's right to recovery rests, *is unsupported by any finding*, and a waiver cannot be inferred from the fact of the agent's knowledge and an estoppel tacked onto the inference of waiver.

In *Patterson v. United States*, 2 Wheat. 221, 225, your Honors held:

> "A verdict is bad if it varies from the issue in a substantial matter, *or if it find only a part of that which is in issue.* The reason of the rule is obvious; it results from the nature and the end of the pleading. Whether the jury find a general or special verdict, it is their duty to decide the very point in issue, and although the court in which the case is tried may give form to a general find-

> ing, so as to make it harmonize with the issue, yet, if it appear to that court, or to the appellate court, that the finding is different from the issue, *or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict.*"

See also *Suydam v. Williamson*, 20 How. 427.

The circuit court of appeals for the seventh circuit in *Wesson v. Saline County*, 73 Fed. 917, said:

> "The question for review upon a special verdict or finding is whether the facts found are sufficient to support the judgment, (Rev. St., § 700), and it is manifestly important, especially to the party having the burden of proof, that atl the facts essential to the relief sought shall be explicitly and fully stated."

The same court in *Sneed v. Sabinul Mining & Milling Co.*, 73 Fed. 925, say:

> "Care should be taken to distinguish between the finding of fact and a mere statement of evidence which tends to establish, or, it may be, establishes the fact."

And in *Daube v. P. & R. Coal & Iron Co.*, 77 Fed. 713:

> "The silence of the verdict in respect to a fact is equivalent to an express finding against the party who has the burden of proof, . . . and if facts essential to that conclusion have not been found, the necessary inference is that they did not exist."

See also *United States v. Harris*, 77 Fed. 821.

Judge CALDWELL, dissenting from the majority of the circuit court of appeals for the eighth circuit, in *McMaster v. New York Life Ins Co.*, 99 Fed. 856, 887, says:

> "The rule is absolute and without an exception that the special findings of fact of the lower court must dis-

tinctly and specifically find every fact essential to support its judgment. *Nothing can be supplied by intendment.*"

Judge SANBORN, in his dissenting opinion in this case (p. 54) says:

"There can be no waiver without an intent to waive and *no intent to waive can be deduced or inferred from the mere fact of knowledge* in the face of express written stipulation to the contrary made and delivered at the time."

Circuit Judge JENKINS of the circuit court of appeals for the seventh circuit in *United Firemen's Insurance Co. v. Thomas*, 82 Fed. 406, uses substantially the same language.

There is a conflict upon this point between the judgment in this case of the circuit court of appeals for the eighth circuit upon the one hand, and this court and the circuit court of appeals for the seventh circuit and Judge SANBORN on the other.

It is, therefore, respectfully submitted that the great importance of the question of insurance law involved, and the conflict between this court and the circuit court of appeals for the eighth circuit, and between the circuit courts of appeals for the seventh and eighth circuits, and the lack of harmony among the judges of the circuit court of appeals for the eighth circuit, should move your Honors to issue the writ of *certiorari* herein and upon consideration with such assistance as counsel can give, settle whether or not a contract, plain in its terms, shall be enforced.

NORTHERN ASSURANCE COMPANY
OF LONDON, ENGLAND,
By CHARLES GREENE and
RALPH W. BRECKENRIDGE,
Its Attorneys.

OMAHA, May 4, 1900.